

# EXHIBIT 9

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

AUDIBLE MAGIC CORPORATION	)	
	)	
<i>Counterclaim Plaintiff</i>	)	
	)	Civil Action No. 6:12-CV-0499- RWS-
v.	)	CMC
	)	
BLUE SPIKE, LLC, BLUE SPIKE, INC.	)	
and SCOTT A. MOSKOWITZ	)	
	)	JURY TRIAL DEMANDED
<i>Counterclaim Defendants.</i>	)	

**RULE 26 EXPERT REPORT OF ALAN RATLIFF**  
**ON BEHALF OF COUNTERCLAIM PLAINTIFF AUDIBLE MAGIC CORPORATION**  
**CONFIDENTIAL OUTSIDE COUNSEL ONLY**

This report is being provided pursuant to the agreements of the parties, the Court's scheduling and other orders, the Local Rules, and the Federal Rules of Civil Procedure and Evidence. Discovery is ongoing and if additional information that may be relevant to my opinions comes to light, or is discovered or produced by the parties near or after the date this report is signed, I reserve the right to supplement my opinions. Further, I may offer opinions at deposition or trial that are not disclosed in this report, but are related to the subjects of my opinions or my expertise and that are responsive to opinions in the reports or testimony of any witness that occurs near or after my report is signed or my deposition is taken. Further, I reserve the right to expand upon the opinions reflected in this report.

Respectfully submitted,

*Alan Ratliff*

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Alan Ratliff, CPA-CFF-CGMA-CPVA  
MPA-JD  
Dated: March 2, 2015

## **INTRODUCTION**

### **Scope of Assignment**

1. I have been retained by the law firm of Orrick, Herrington & Sutcliffe LLP on behalf of counterclaimant Audible Magic Corporation (“Audible Magic” or “Counterclaimant”) as an independent expert witness on damages and related topics. More specifically, my opinions relate to the damages that may be due to Audible Magic from counter-defendants Blue Spike, LLC (“BSLLC”), Blue Spike, Inc. (“BSI”) and Scott A. Moskowitz (“Mr. Moskowitz”) (collectively “Blue Spike” or “Counter-Defendants”).<sup>1</sup> Specifically, I have been asked to determine the amount of damages, if any, due to Audible Magic assuming Audible Magic establishes Blue Spike is liable for the various causes of action alleged.<sup>2</sup>

### **Qualifications**

2. I am a Certified Public Accountant and a licensed attorney in Texas, and I am nationally certified in patent valuation, global management accounting and financial forensics. I am a member of the Bars of the State of Texas, the U.S. Supreme Court, the Eastern District of Texas, and other federal appellate and district courts, clerked for the Hon. J. Smith Henley of the U.S. Court of Appeals for the Eighth Circuit, and am a past chapter president of the Federal Bar Association.
3. I hold undergraduate and graduate degrees in business and accounting from Baylor University (magna cum laude, published theses in accounting/economics), and my Juris Doctorate from Southern Methodist University (cum laude, Law Review, Order of the Coif, published article on tax/economic policy), totaling more than 120 hours of economics and commercial studies. I have 25 years of legal, accounting and economic consulting experience including as National Practice Leader for Intellectual Property Litigation Services at Ernst & Young and a former attorney with Weil, Gotshal & Manges LLP.
4. I have worked on more than a 100 projects involving patents and licensing as a consultant, and have testified at trial as a financial expert 40 times, about half involving patent or licensing issues and a dozen of those in the Eastern District of Texas. In addition to serving

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<sup>1</sup> Based on deposition testimony given by Blue Spike’s founder (Mr. Moskowitz), I understand that the practical differences between BSI and BSLLC are the legal structure, corresponding tax implications and the remaining investors after BSI was transitioned to BSLLC.

<sup>2</sup> Audible Magic Corporation’s Answer to Blue Spike LLC’s First Amended Complaint for Patent Infringement and Counterclaims Against Blue Spike LLC, Blue Spike, Inc. and Scott A. Moskowitz filed April 18, 2014 (“Counterclaim”) at 43-46, 49-53.

as an expert, I have also participated in dozens of patent licensing and valuation projects for inventors and companies, as well as non-profits such as Boston University, Cal Tech, University of Texas, UVA, SUNY, Kansas State, and Industrial Technology Research Institute, among others, including negotiating and participating in the negotiation of licenses.

5. I have also served as a court appointed arbitrator in the Northern and Southern Districts of Texas, and Texas state district court as a court appointed auditor, and as a court-appointed Special Master in a billion dollar international patent licensing dispute for the District of Maryland. My recent testimony is reflected in StoneTurn Exhibit A.
6. My litigation, licensing and valuation projects in connection with ecommerce and web-based technologies involving database, identification, verification, security and related functionalities involved companies including ADP, Alcatel-Lucent, Amazon, Autobytel, Corelogic, Dealix, Dell, eBay, HP, IDT, Informix, Internet Brands, Photobucket, Upaid, Variant, VERITAS, Versata, and all the major hotel chain online reservation systems (Starwood, Hyatt, Hilton, Marriott etc.), among others.
7. I am a member of and am active in relevant expert, litigation, damages and licensing committees of the ABA's Litigation and IP Sections, AIPLA, IPO, State Bar of Texas, HIPLA and Licensing Executives Society, as well as the AICPA and Texas Society of CPAs, having chaired or co-chaired several substantive committees. I have served as an adjunct professor or guest lecturer at Baylor University, Boston University, University of Houston, South Texas College of Law, University of Texas and Virginia Tech.
8. I also regularly speak at and attend courses on subjects about which I testify. Most recently, I was a panelist for the damages roundtable at the University of Texas in 2014, as well as a panelist on the patent damages panels at the 2011 and 2012 IPO annual meetings, 2012 State Bar of Texas Intellectual Property Law Course, 2013 State Bar of Texas Advanced Patent Litigation Course, 2012 HIPLA IP Institute, 2013 Fordham IP Summit, and I served on the licensing panel at the 2011 AIPLA annual meeting. I have also chaired and co-chaired CLE programs, including an IP course for the Houston Bar Association, the patent damages track for IPO's 2012 annual meeting, the trade secret track at the 2013 AIPLA annual meeting and currently coordinating the litigation track at the 2015 AIPLA annual meeting, and I co-chaired the AIPLA's Trade Secret Section's Damages & Valuation Committee for 2013-14.



I also recently served as a voting member on the 2013 State Bar of Texas Trade Secret Committee that drafted the TUTSA passed by the Texas Legislature.

9. I have spoken at programs offered by the American Bar Association, American Society of Appraisers, California and Texas Society of CPAs, Association of Corporate Counsel, Licensing Executives Society, University of Texas, regional bar associations in Louisiana, New York and Texas, Federal Bar Association, and People to People legal exchange programs in China, Cuba and India.
10. I have also published articles on economic policy, damages, expert standards, licensing, valuation and other topics in the Houston Law Review, SMU Law Review (JAL&C), South Texas Law Review and Texas Tech Law Review, Journal of Commercial Biotechnology, ABA IP and Litigation Section Newsletters, Fifth Circuit Reporter, State Bar of Texas' Advocate and IP Section Newsletter, Aspen Legal's Trial Lawyer, Texas Lawyer, and the expert evidence chapter in the Handbook of Texas Evidence, among others. My public speeches/publications are listed in Exhibit A.

#### **Compensation**

11. My firm, StoneTurn, is being compensated for the time that I, and those working under my direction, work on this project at rates ranging from \$200 to \$695 per hour and fees are not contingent upon the outcome of this litigation or any opinions proffered in this case.

#### **Basis for Opinions**

12. My opinions are based on the pleadings filed and discovery conducted in this case within a reasonable period of time in advance of my report, interviews of Audible Magic representatives, as well as research conducted by me and those under my direction, all as listed more specifically herein or in StoneTurn Exhibit B. In addition, my opinions are based on my experience, education, training, skill and knowledge discussed herein.
13. Approximately four days before this report was served, Blue Spike produced over 11,000 pages of documents which may include additional documents relevant to my opinions (e.g., missing Blue Spike settlement agreements and negotiation information I requested, see StoneTurn Workpaper 4). Counsel's and my team's review of these documents is ongoing and could not reasonably be completed before I filed my report. If I discover that additional information that is relevant to my opinions is contained in this document production (or any subsequent document production), I reserve the right to supplement my opinions accordingly.

### **SUMMARY OF AUDIBLE MAGIC ALLEGATIONS**

14. As reflected in Audible Magic's counterclaims ten, eleven and thirteen, Audible Magic (and its predecessor Muscle Fish, LLC, hereafter "Muscle Fish") accuses Counter-defendants of taking Audible Magic property and using it without authorization, including, as described in Counter-Defendants' own words, Audible Magic's "proprietary database technology" that was shared with the Counter-Defendants when the parties considered working on a digital watermarking project together.<sup>3</sup> Audible Magic alleges that Blue Spike learned about its content recognition technology during meetings that Mr. Moskowitz and Muscle Fish had in the late 1990s.<sup>4</sup>
15. "Content" here refers to digital music, television and film productions.<sup>5</sup> The technology at issue in this matter is used to identify electronic media, or "content."<sup>6</sup>
16. Specifically, Mr. Moskowitz became aware of Muscle Fish and its content recognition technology in 1997.<sup>7</sup> In June of 1997, Mr. Moskowitz made an inquiry regarding whether Muscle Fish had "done work with Informix on their Tiger line of multimedia databases."<sup>8</sup> At that time, Muscle Fish told him they had developed the Audio Information Retrieval ("AIR") DataBlade module for the Informix Universal Server.<sup>9</sup> About a month later, Mr. Moskowitz told Thom Blum ("Mr. Blum"), a Muscle Fish founder, that one of the areas he would be "suited" to work with Muscle Fish would be "any porting with [Muscle Fish's] own proprietary database technology."<sup>10</sup> Mr. Moskowitz also told Mr. Blum that he wanted to work with Muscle Fish "in a number of extension-projects."<sup>11</sup> Ultimately Moskowitz

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<sup>3</sup> Counterclaim at 44-46 and 49-51; Deposition of Scott Moskowitz dated December 10, 2014 ("Moskowitz deposition Vol. 2") at Exhibits 9 and 11.

<sup>4</sup> Counterclaim at 19-20.

<sup>5</sup> Deposition of Vance Ikezoye dated October 31, 2014 ("Ikezoye deposition") at 164. Content may also be any production of sound or video that a customer wishes to identify. This content is often, but not always, copyrighted, and the associated files contain metadata that describes the limitations on their use. The terms "content-based recognition or CBR" and "automatic content recognition or ACR" are also used as synonyms for content identification using fingerprint/abstract technology (Deposition of Curtis Dowdy dated October 30, 2014 ("Dowdy deposition") at 65).

<sup>6</sup> See *Abstract Patents* section for a detailed description of the patents at issue.

<sup>7</sup> Counterclaim at 19-20.

<sup>8</sup> Moskowitz deposition Vol. 2 at 424, 425, Exhibit 9.

<sup>9</sup> Counterclaim at 20; Moskowitz deposition Vol. 2 at 443, Exhibit 9.

<sup>10</sup> Moskowitz deposition Vol. 2 at Exhibit 11.

<sup>11</sup> Moskowitz deposition Vol. 2 at Exhibit 11.

decided to work with an audio engineer instead of with Muscle Fish and the project did not move forward.<sup>12</sup>

17. As discussed below in more detail in the *Failure of Digital Watermarking Technology* section, Mr. Moskowitz continued to pursue digital watermarking over the next two years. Upon the failure of that business,<sup>13</sup> Mr. Moskowitz filed for his first patent application related to the Abstract Patents in September 2000.<sup>14</sup>
18. Blue Spike uses the term “abstract” to describe a digital snippet of audio in a piece of content that is used to identify the whole work.<sup>15</sup> Audible Magic uses the term “fingerprint” to describe a sample of content used by Audible Magic to identify the whole.<sup>16</sup> I am not opining that “fingerprint” is synonymous with “abstract” as those terms are used by the parties. However, for simplification and discussion purposes only, I use the term “Abstract Patents” to describe the patents that are the subject of Audible Magic’s allegations and consistent with the terminology in Blue Spike’s patents.<sup>17</sup> Also, Audible Magic contests the validity and enforceability of Blue Spike’s patents, and denies any infringement.<sup>18</sup>
19. Audible Magic alleges that Blue Spike mischaracterized prior art with the intent to deceive the USPTO.<sup>19</sup> Audible Magic claims that Blue Spike knew of the prior art and of its materiality to patentability and that these patents were procured through fraud and are unenforceable.<sup>20</sup> As a result, Audible Magic alleges that Blue Spike’s patents should not have issued and are both unenforceable and invalid.<sup>21</sup>
20. Furthermore, Audible Magic alleges that Blue Spike made false and misleading statements and their activities caused unfair competition, e.g., that Scott Moskowitz was “the ‘first to create’ content ‘fingerprinting’ technology” and “that ‘fingerprinting’ technology is ‘technology that has powered his Blue Spike products since the turn of the century’.”<sup>22</sup> Audible Magic’s claims against Blue Spike include but are not limited to, unjust enrichment,

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<sup>12</sup> Moskowitz deposition Vol. 2 at Exhibit 11.

<sup>13</sup> Moskowitz deposition Vol. 2 at 527-528, 531, 533 and Exhibit 26.

<sup>14</sup> U.S. Patent No. 7,346,472.

<sup>15</sup> Deposition of Scott Moskowitz dated January 15, 2015 (“Moskowitz deposition Vol. 5”) at 1237.

<sup>16</sup> Ikezoye deposition at 54-55.

<sup>17</sup> A more detailed description of the “Abstract Patents” is included in the *Blue Spike “Abstract Patents”* section.

<sup>18</sup> Counterclaim at 39-43 and 43-44.

<sup>19</sup> Counterclaim at 43. USPTO is an acronym for the United States Patent and Trademark Office.

<sup>20</sup> Counterclaim at 43.

<sup>21</sup> Counterclaim at 43-44.

<sup>22</sup> Counterclaim at 49-50.

unauthorized and unlicensed use, false and misleading statements, wrongful and inequitable conduct, willful deceit, bad faith acts and unfair competition and that Blue Spike unjustly profited from both patent licenses and litigation settlements related to the Abstract Patents.<sup>23</sup>

21. Blue Spike's taking and use, without authorization, of Audible Magic's technology, ideas and information includes, but is not limited to patenting them as inventions, non-exclusively licensing the Abstract patents to RPX Corporation ("RPX") and currently suing more than 90 defendants (including Audible Magic) for patent infringement. So far, Blue Spike's false statements, unfair competition and unjust enrichment activities have resulted in millions of dollars in diverted royalty payments to Blue Spike.<sup>24</sup> Audible Magic seeks, among other remedies, Blue Spike's profits from using Audible Magic's technology without authorization, and an accounting of profits.

## **BACKGROUND**

### **Parties**

#### **Audible Magic Corporation**

#### **Muscle Fish, LLC**

22. Muscle Fish was a consulting company founded in 1992 in Berkeley, California.<sup>25</sup> The founders of Muscle Fish began working with signal processing and sound technologies in the late 1970's, and in the 1990's, Muscle Fish "designed a system for looking up and comparing known and unknown content based on a set of features of content called 'MFCCs'."<sup>26</sup> Throughout the 1990's Muscle Fish sold content-based recognition ("CBR") products and services called "cbrStream" and "SoundFisher" and "publicized implementations of these technologies, including Audio Information Retrieval (AIR) DataBlade module for INFORMIX Universal Server" as an example.<sup>27</sup>

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<sup>23</sup> Counterclaim at 43-46, 49-52.

<sup>24</sup> Counterclaim at 44-45, 51; Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723); StoneTurn Workpaper 3.

<sup>25</sup> Counterclaim at 16.

<sup>26</sup> Counterclaim at 16-17. MFCC is an acronym for Mel Frequency Cepstral Coefficients, a feature widely used in automatic speech and speaker recognition (Practical Cryptography, "Mel Frequency Cepstral Coefficient (MFCC) Tutorial" [practicalcryptography.com/miscellaneous/machine-learning/guide-mel-frequency-cepstral-coefficients-mfccs/](http://practicalcryptography.com/miscellaneous/machine-learning/guide-mel-frequency-cepstral-coefficients-mfccs/)). Muscle Fish was granted a patent (U.S. 5,918,223) for this invention in June 1999 (Counterclaim at 16-17 and U.S. Patent No. 5,918,223).

<sup>27</sup> Counterclaim at 17.

Audible Magic

23. Audible Magic was formed as Wired Air, LLC in 1999 by Vance Ikezoye and James Schrempp in Los Gatos, California.<sup>28</sup> The company provides digital fingerprint content recognition technology allowing for faster and more accurate identification of music, movies, online games and ads.<sup>29</sup> Audible Magic is known as “the leading innovator in automated content recognition (ACR) technology for ‘smart’ consumer electronics (CE) and other applications.”<sup>30</sup> In addition, Audible Magic “has evolved into one of the primary video and audio fingerprinting services for various record labels (including Warner, \*Sony\* BMG and EMI), video sites (e.g., VideoEgg and YouTube) and institutions like the University of Chicago.”<sup>31</sup>

24. In 2000, Audible Magic acquired Muscle Fish, [REDACTED]

[REDACTED]<sup>32</sup>

Products and Services

25. All of Audible Magic’s Content Identification (“CID”) products and services provide digital media content identification to monetize, protect, measure and verify content in various mediums.<sup>33</sup> [REDACTED]

services involve the identification of registered copyrighted content from audio or video tracks.<sup>37</sup> Audible Magic also offers hardware and software to manage and control peer-2-peer traffic for both public and private network operators. The remainder of Audible

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<sup>28</sup> Counterclaim at 18; Tech News and Analysis, “Audible Magic Raises Nearly \$1.3 Million in Funding” <http://gigaom.com/2009/08/21/419-audible-magic-raises-nearly-1-3-million-in-funding/>; Audible Magic Corporation: Private Company Information - Businessweek, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=936050>.

<sup>29</sup> <https://twitter.com/audiblemagic>.

<sup>30</sup> BusinessWire, “Audible Magic Launches Video Fingerprint ACR Technology,” dated June 24, 2013.

<sup>31</sup> Tech News and Analysis, “Audible Magic Raises Nearly \$1.3 Million in Funding” <http://gigaom.com/2009/08/21/419-audible-magic-raises-nearly-1-3-million-in-funding/>.

<sup>32</sup> AUDMAG00047982; AUDMAG00049927-958 at 927, 931; AUDMAG0049960-63 at 960.

<sup>33</sup> Audible Magic Corporation: Private Company Information - Businessweek, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=936050>.

<sup>34</sup> Dowdy deposition at 96-97.

<sup>35</sup> Dowdy deposition at 62-63. Copyright Compliance is an Audible service provided to social networks and media sharing web sites.

<sup>36</sup> Ikezoye deposition at 251.

<sup>37</sup> Ikezoye deposition at 153, 251.

Magic's business relates to services used to identify copyrighted works to reduce the risk of replicating pirated content.<sup>38</sup>

### **Blue Spike**

#### Scott Moskowitz

26. Mr. Moskowitz is the founder, owner and sole employee of four business entities including, in chronological order of start date, Wistaria Trading, Inc. ("Wistaria"),<sup>39</sup> The DICE Company ("DICE"), BSI and BSLLC.<sup>40</sup> Three of the four entities are directly involved in Blue Spike's legal and financial matters (Wistaria, BSI and BSLLC), and two are parties to the patent infringement litigation against Audible Magic (BSI and BSLLC).

27. Despite renting office space and an apartment in Tyler, Texas, Mr. Moskowitz resides in Sunny Isles Beach, Florida, has maintained his primary residence there since 1998,<sup>41</sup> and owns no other real property.<sup>42</sup> He works in Florida, particularly the Miami area,<sup>43</sup> and also incorporated BSI in Florida.<sup>44</sup> In addition, his accountants and personal attorney are located in Florida<sup>45</sup> and he deposits settlement proceeds into a Wistaria bank account in Florida.<sup>46</sup>

28. Mr. Moskowitz not only maintains a bank account in Florida, but also has bank accounts in Japan and Ireland and is opening another in Bermuda.<sup>47</sup> The bank accounts in Ireland are related to two additional entities, Blue Spike Limited and Blue Spike Holdings, both of which only hold intellectual property.<sup>48</sup> The account in Bermuda is being opened through HSBC for Wistaria Trading, Ltd.<sup>49</sup> though it is unclear if Mr. Moskowitz intends to deposit or transfer any settlement proceeds into that account.<sup>50</sup>

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<sup>38</sup> Business Week: <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=936050>.

<sup>39</sup> Blue Spike documents also refer to Wistaria as "Wistaria Trading Company."

<sup>40</sup> First Amended Complaint for Patent Infringement Against Audible Magic Corporation, et al filed April 4, 2014 ("Complaint") at 10; Moskowitz deposition Vol. 2 at 494, 590, 591, 603, 607; Deposition of Scott Moskowitz dated December 11, 2014 ("Moskowitz deposition Vol. 3") at 645, 664-665; Deposition of Scott Moskowitz dated January 14, 2015 ("Moskowitz deposition Vol. 4") at 1019, 1086; Vol. 5 at 1136, 1138 - 1140, 1202, 1233, 1242, 1254, 1255, 1265, 1270; Deposition of Scott Moskowitz dated January 16, 2015 ("Moskowitz deposition Vol. 6") at 1441.

<sup>41</sup> Moskowitz deposition Vol. 2 at 435, 575; Vol. 6 at 1455 and 1507-1508.

<sup>42</sup> Moskowitz deposition Vol. 2 at 577.

<sup>43</sup> Moskowitz deposition Vol. 2 at 570; Vol. 5 at 1291, 1406.

<sup>44</sup> Moskowitz deposition Vol. 6 at 1459-1460.

<sup>45</sup> Moskowitz deposition Vol. 3 at 656-666.

<sup>46</sup> Moskowitz deposition Vol. 2 at 586; Vol. 6 at 1425-1426 and 1503.

<sup>47</sup> Moskowitz deposition Vol. 2 at 578; Vol. 6 at 1442.

<sup>48</sup> Moskowitz deposition Vol. 2 at 580.

<sup>49</sup> Moskowitz deposition Vol. 2 at 581, 582.

<sup>50</sup> Moskowitz deposition Vol. 6 at 1442-1446.



Wistaria Trading, Inc.

29. In 1991, Mr. Moskowitz formed Wistaria.<sup>51</sup> The company trades commodity and consumer goods between the United States, Europe and Japan.<sup>52</sup> Wistaria also holds many patents, not including the Abstract Patents, which Wistaria licensed to BSI previous to the assignment of those rights to BSLLC.<sup>53</sup> Furthermore, as with his other companies, Mr. Moskowitz is the sole employee of Wistaria and besides his father, the only other director.<sup>54</sup>

The DICE Company

30. In 1993, Mr. Moskowitz founded DICE, a software startup in Palo Alto, California, to develop digital watermarking technology.<sup>55</sup> At the same time, he filed his first patent application for digital-content management.<sup>56</sup> From March 1995 to October 1996, he along with Marc Cooperman (“Mr. Cooperman”), the technically skilled partner, worked to create “Argent”, a digital watermarking system, but were unsuccessful in developing a working system.<sup>57</sup> In fact, by October 1996, Mr. Cooperman had not completed any workable software of any type for DICE.<sup>58</sup> Ultimately, through a default judgment, all of the assets of DICE “became the property of Wistaria Trading [and] were then licensed to Blue Spike, [Inc.] to form the corporation in the form of a patent license.”<sup>59</sup>

Blue Spike, Inc.

31. Mr. Moskowitz incorporated BSI in November 1997, and continued his efforts to generate interest in digital watermarking technology.<sup>60</sup> Wistaria licensed the DICE assets, including at least one patent, to BSI for 3%,<sup>61</sup> but I do not have the agreement or additional testimony describing the terms of this agreement. Mr. Moskowitz was and is “the sole director, the sole officer [and] the sole employee of the business” both in 1997 and presently (successor BSLLC).<sup>62</sup> Most recently, Mr. Moskowitz filed for total dissolution of BSI.<sup>63</sup>

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<sup>51</sup> Moskowitz deposition Vol. 2 at 494.

<sup>52</sup> Moskowitz deposition Vol. 2 at 494; Vol. 5 at 1268.

<sup>53</sup> Moskowitz deposition Vol. 5 at 1133, 1269.

<sup>54</sup> Moskowitz deposition Vol. 5 at 1270.

<sup>55</sup> Counterclaim at 19; Complaint at 10.

<sup>56</sup> Complaint at 10.

<sup>57</sup> Counterclaim at 19.

<sup>58</sup> Moskowitz deposition Vol. 2 at 495; Counterclaim at 19.

<sup>59</sup> Moskowitz deposition Vol. 6 at 1509.

<sup>60</sup> Moskowitz deposition Vol. 2 at 532; Vol. 5 at 1133, 1139-1140, 1241.

<sup>61</sup> Moskowitz deposition Vol. 6 at 1509.

<sup>62</sup> Moskowitz deposition Vol. 4 at 1019; Vol. 5 at 1136, 1139-1140.

<sup>63</sup> Moskowitz deposition Vol. 5 at 1149, 1150, 1208, 1258, 1259, 1261.

*Failure of Digital Watermarking Technology*

32. Not surprisingly, BSI's digital watermarking business failed, at least in part, "because its watermarking solution had not been adopted by a standards body working on a proposed digital watermarking industry standard called, 'SDMI'."<sup>64</sup> By the summer of 1999, Mr. Moskowitz even ceased proposing BSI's digital watermarking technology to the "4C" companies: Matsushita, Toshiba, IBM and Intel.<sup>65</sup> After failing to win enough customers for the BSI digital watermarking technology, Blue Spike transitioned to the content-based recognition technology which is the subject of Audible Magic's claims in this matter and what Blue Spike terms as content abstracting technology.<sup>66</sup>

*Failure to Develop the Giovanni® Abstraction Machine™*

33. BSI's "Giovanni® Abstraction Machine™" was a machine in name only because BSI never developed a prototype or other tangible implementation as suggested by the product's name.<sup>67</sup> BSI did not have an employee with technical skills to work on creating a product and Mr. Moskowitz lacked the technical background to develop commercially viable software; thus, BSI struggled.<sup>68</sup> By February 2001, BSI had not built a signal abstract based database identification system<sup>69</sup> and never sold a product or service of any kind.<sup>70</sup> Mr. Moskowitz testified that "...we [BSI] didn't develop a system... we showed them what we could do."<sup>71</sup>

34. Despite BSI's lack of technical wherewithal or viable product, Mr. Moskowitz and Michael Berry filed an application for U.S. Patent Number 7,346,472 (the "'472 patent"), the first Abstract Patent, in September 2000.<sup>72</sup> The '472 patent issued in 2008, and, as explained in more detail hereafter, Blue Spike began soliciting licenses and later expanded the licensing model to include multi-party litigation. Without a commercial content recognition product of

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<sup>64</sup> Counterclaim at 25; SDMI stands for Secure Digital Music Initiative (Complaint at 13).

<sup>65</sup> Moskowitz deposition Vol. 2 at 531 and 533.

<sup>66</sup> Generally, Moskowitz deposition Vol. 4 at Exhibit 26. BSI offers signal abstracting as a backup to digital watermarking.

<sup>67</sup> Moskowitz deposition Vol. 4 at 1023-1024.

<sup>68</sup> Counterclaim at 19.

<sup>69</sup> Moskowitz deposition Vol. 4 at 1119.

<sup>70</sup> Moskowitz deposition Vol. 4 at 914, 1023-1025; Vol. 5 at 1142, 1145-46, 1153-1154, 1235.

<sup>71</sup> Moskowitz deposition Vol. 4 at 1118.

<sup>72</sup> USPTO Assignments on the Web for the '472 Patent; Deposition of Scott Moskowitz dated December 9, 2014 ("Moskowitz deposition Vol. 1") at 139.



any kind, Mr. Moskowitz and Blue Spike developed and implemented a patent licensing and litigation settlement strategy.

*Blue Spike, LLC*

35. Mr. Moskowitz formed BSLLC in May 2012, and transferred all patent rights from BSI to BSLLC on August 4, 2012,<sup>73</sup> only five days before launching the BSLLC patent litigation campaign.<sup>74</sup> As of January 15, 2015, Mr. Moskowitz was the sole member of BSLLC.<sup>75</sup> While BSLLC holds all of the patents, the company has no operating functions and sells no products or services.<sup>76</sup>

*Blue Spike “Abstract” Patents*

36. As described in more detail in the *Blue Spike Exploitation of Abstract Patents* section hereafter, Blue Spike has asserted four related patents against at least 90 defendants, including Audible Magic.<sup>77</sup> These patents and the inventions described therein are the subject of Audible Magic’s claims against Blue Spike;<sup>78</sup> thus, I have broadly described them in the following paragraph.

37. The ‘472 patent as well as U.S. Patent Numbers 7,660,700, 7,949,494 and 8,214,175 (collectively, the “Abstract Patents”) relate to automatic content recognition technology.<sup>79</sup> The Abstract Patents claim a method and system of generating and storing an “abstract of a... reference signal” and then comparing the “abstract of a query signal” against the reference database of signals “for a match.” The ‘472 patent issued first in 2008, and the subsequent Abstract Patents are continuations of the ‘472 patent.<sup>80</sup> See Table 1 below for a list of the Abstract Patents and the corresponding application and issue dates.<sup>81</sup>

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<sup>73</sup> Moskowitz deposition Vol. 5 at 1242; USPTO Assignments on the Web for the ‘472 patent and continuations.

<sup>74</sup> Original Complaint for Patent Infringement filed August 9, 2012 (“Original Complaint”).

<sup>75</sup> Moskowitz deposition Vol. 5 at 1254.

<sup>76</sup> Moskowitz deposition Vol. 5 at 1142, 1243.

<sup>77</sup> StoneTurn Workpaper 4; Complaint at 1-2. This total does not include Audible Magic or its customers who are defendants in this litigation.

<sup>78</sup> Counterclaim at 43-44.

<sup>79</sup> U.S. Patent Nos. 7,346,472; 7,660,700; 7,949,494; and 8,214,175. I use the term “Abstract Patents” only to be consistent with the terminology used by Mr. Moskowitz in deposition. I am not offering an opinion regarding the subject matter of these patents because a technical description is beyond the scope of this report and my opinions.

<sup>80</sup> U.S. Patent Nos. 7,346,472; 7,660,700; 7,949,494; and 8,214,175.

<sup>81</sup> U.S. Patent Nos. 7,346,472; 7,660,700; 7,949,494; and 8,214,175.

Table 1

Patent	Continuation	Application Date	Issue Date
7,346,472 B1		Sep 7, 2000	Mar 18, 2008
7,660,700 B2	'472 patent	Dec 26, 2007	Feb 9, 2010
7,949,494 B2	'700 patent	Dec 22, 2009	May 24, 2011
8,214,175 B2	'494 patent	Feb 26, 2011	Jul 3, 2012

### **SUMMARY OF OPINIONS**

38. As noted in the *Introduction*, I have assumed liability. Based on the discovery to date, there is a straightforward nexus between Blue Spike's wrongful acts (e.g., misappropriation and use, falsifying patents) and its unjust enrichment (i.e., the profits from the royalty payments resulting from commercially exploiting the Abstract Patents). These profits can be computed with reasonable certainty.
39. Audible Magic's damages for Blue Spike's unjust enrichment *to date* are \$6.7 million based on Blue Spike's profits from the ill-gotten royalty payments. StoneTurn Exhibit 1. I have estimated an additional \$1 million in damages for royalty payments associated with parties dismissed with prejudice but whose agreements have not been produced.

### **OPINIONS & CONCLUSIONS**

40. The following paragraphs outline the relevant facts and data points available to me as of the date of this report. As additional information becomes available through further document review, production and depositions, I reserve the right to supplement this report accordingly.
41. Unjust enrichment represents the economic benefits enjoyed by Blue Spike as a result of their alleged wrongful acts and disgorgement of that benefit, e.g., profits, is available as a remedy for the tort and statutory causes of action discussed above. Actual losses may also be available.

**Blue Spike Exploitation of Abstract Patents**

42.

43.

44.

**Agency Fees Paid by Blue Spike for Licenses and Settlements**

45.

46.

47.

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<sup>82</sup> Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723); RPX Corp. Form S-1, September 2, 2011 at 1.

<sup>83</sup> BLU0023647-648; Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723).

<sup>84</sup> The totals do not include Audible Magic or its customers who are defendants in this litigation.

<sup>85</sup> Moskowitz deposition Vol. 5 at 1191, 1273-1274.

<sup>86</sup> Moskowitz deposition Vol. 5 at 1184, 1191, 1192, 1197, 1198, 1220.

<sup>87</sup> Moskowitz deposition Vol. 5 at 1184, 1191, 1192, 1197, 1198, 1220.

<sup>88</sup> Moskowitz deposition Vol. 5 at 1185-1186, 1189, 1223.

<sup>89</sup> Moskowitz deposition Vol. 5 at 1273-1274.

<sup>90</sup> Moskowitz deposition Vol. 5 at 1273-1274. Not all of the settlement agreements involved a royalty because some defendants have “not sold any” of the Accused Products or sales of the Accused Products were “de minimis” (see, for example, BLU013546-550).

<sup>91</sup> Moskowitz deposition at Vol. 6 at 1502, 1503, 1504. Blue Spike did not produce documents explaining how the agency fees are calculated.

<sup>92</sup> Moskowitz deposition Vol. 6 at 1502, 1503, 1504.

<sup>93</sup> Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723).

<sup>94</sup> Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723 at 690).

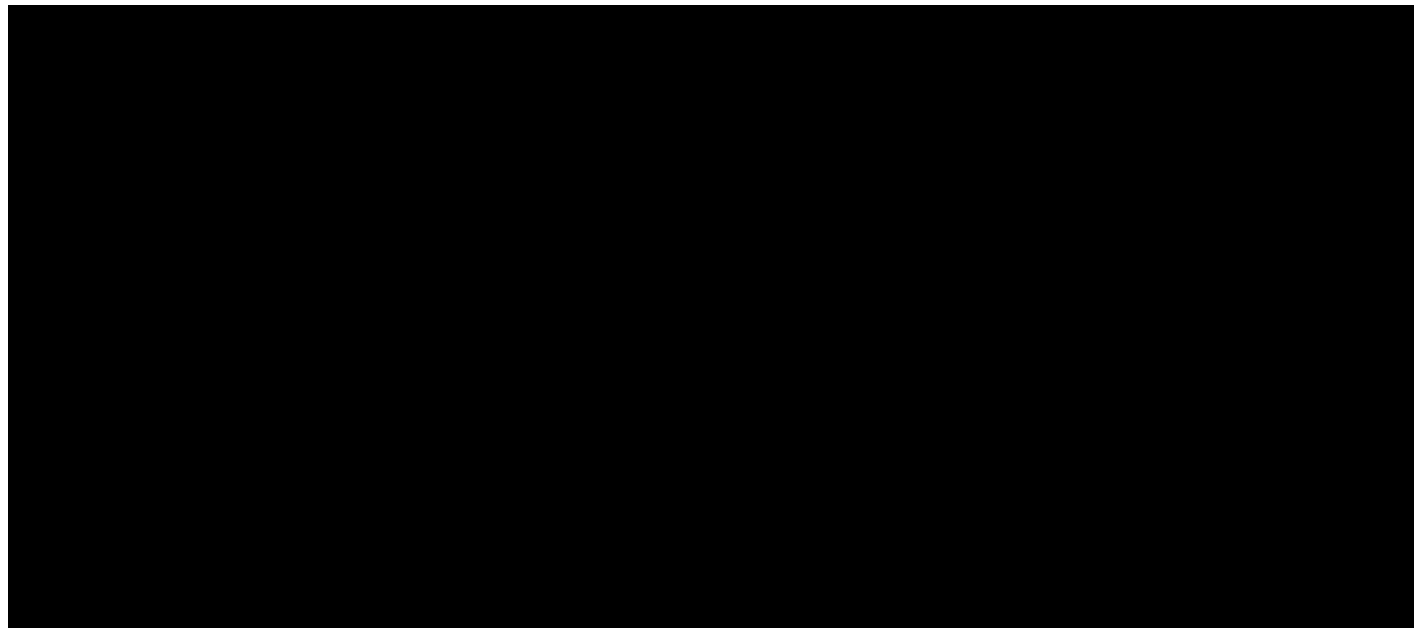
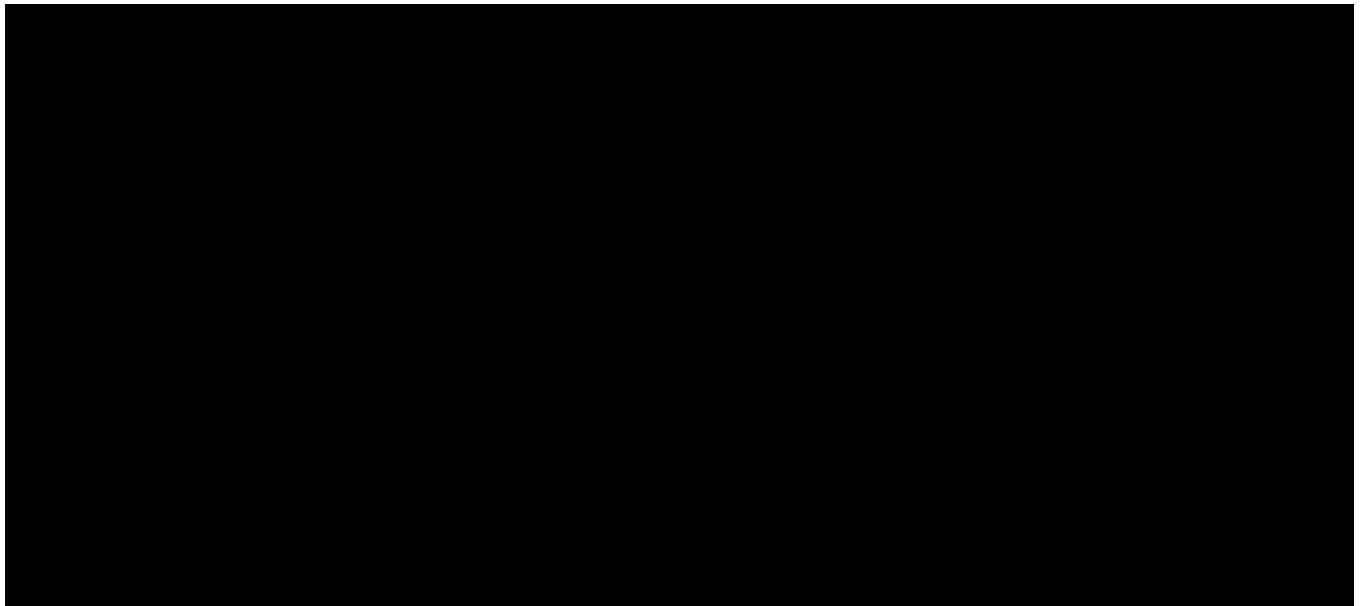
<sup>95</sup> [REDACTED] September 2, 2011 at 1, 65.

<sup>96</sup> [REDACTED] September 2, 2011 at 1-3, 34, 65.

<sup>97</sup> [REDACTED] September 2, 2011 at 65. Some term licenses include a “vesting provision that converts a client’s term licenses into perpetual licenses on a delayed rolling basis.”

<sup>98</sup> Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723 at 691, 692, 694, 706-712).

<sup>99</sup> Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723 at 695, 697).



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<sup>100</sup> Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723 at 693-694, 695).

<sup>101</sup> Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723 at 693-695).

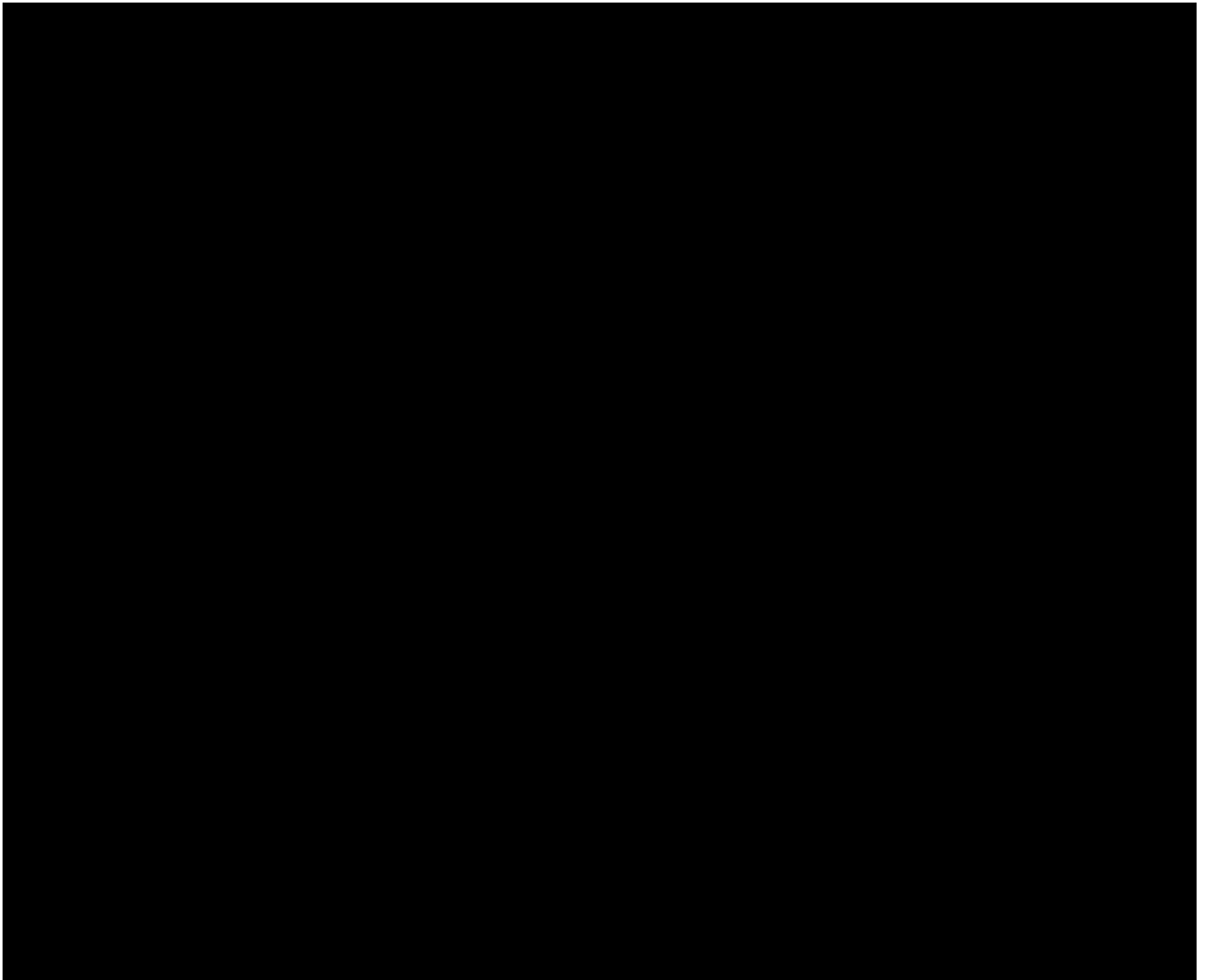
<sup>103</sup> BLU023647-648.

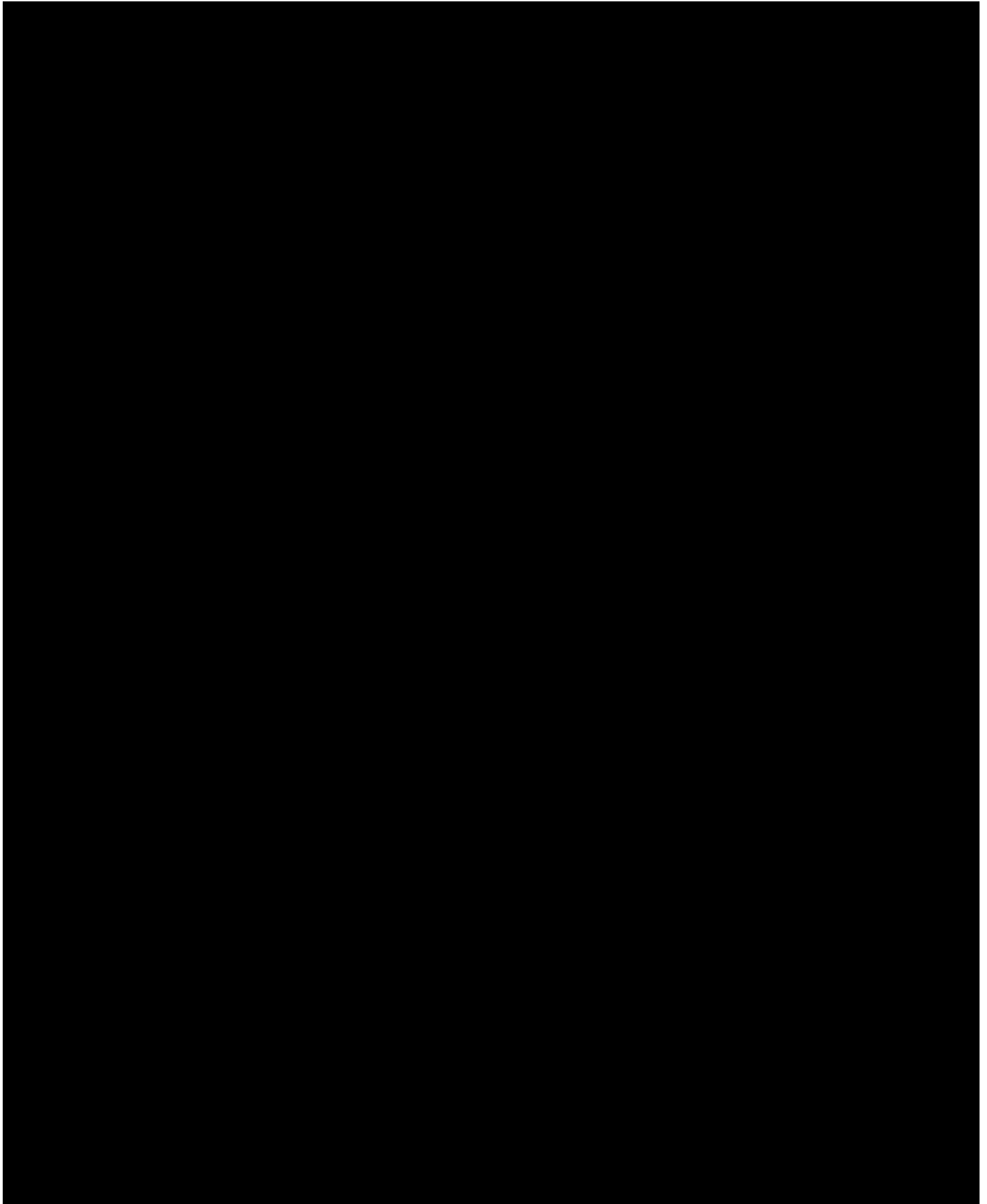
<sup>104</sup> BLU023647-648.

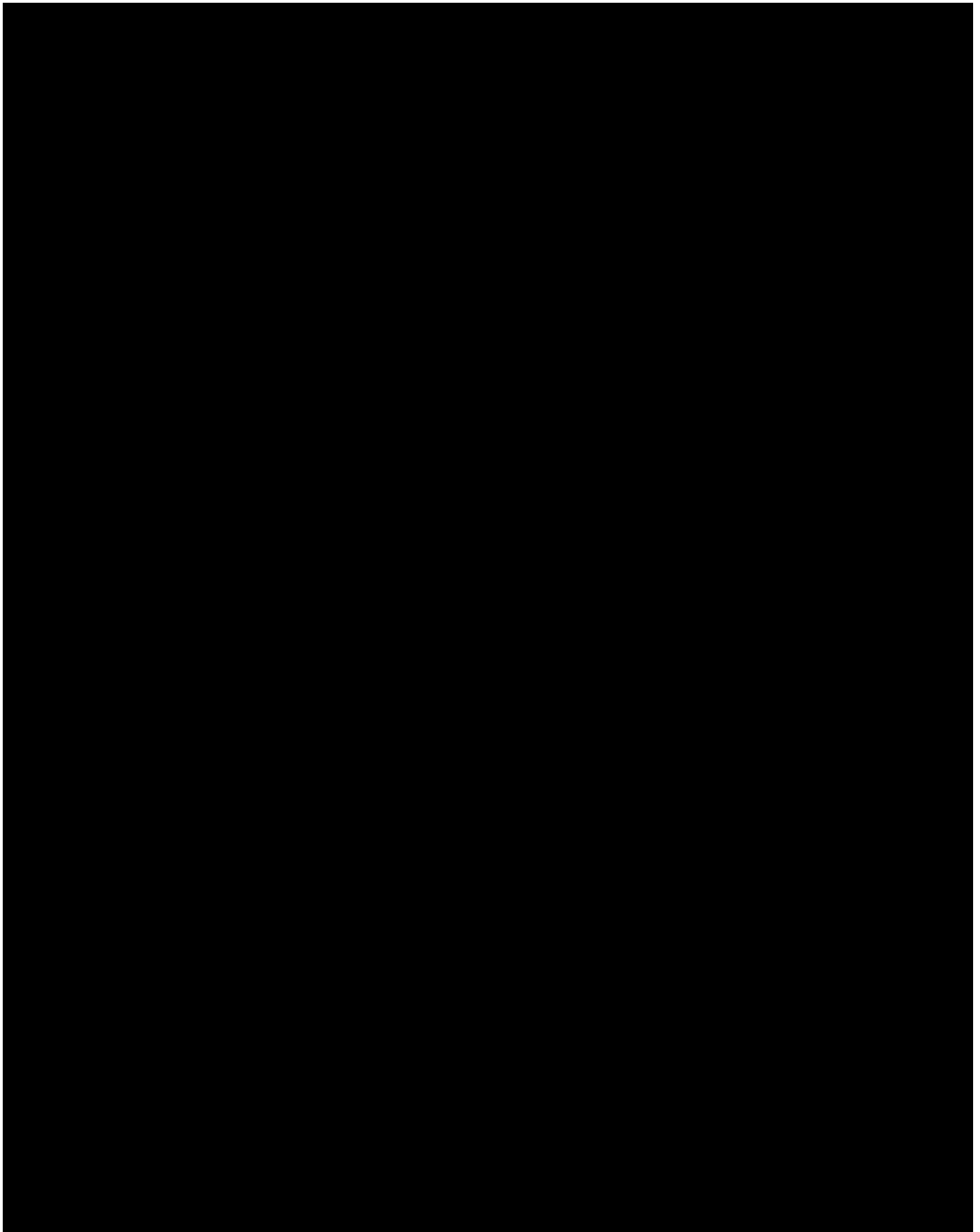
<sup>105</sup> BLU023647-648.

<sup>106</sup> BLU023647-648; Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723 at 694).

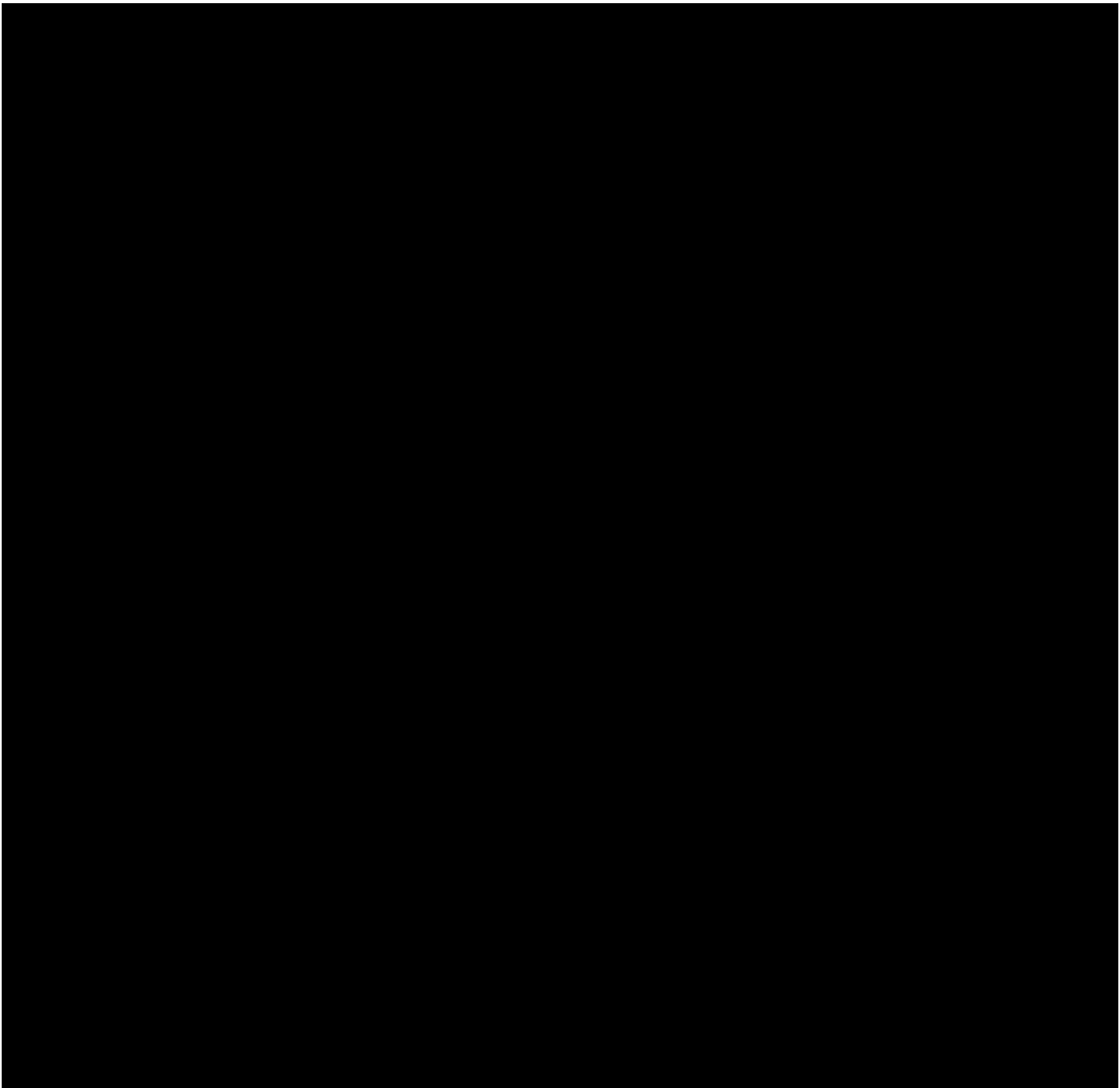
<sup>107</sup> Moskowitz deposition Vol. 5 at Exhibit 29 (BLU002690-723 at 694).











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<sup>119</sup> Alabama Law Review, Volume 64, “The Rise of Contingent Fee Representation in Patent Litigation,” Schwartz, David L., 2012, p. 343.

<sup>120</sup> Moskowitz deposition Vol. 6 at 1505, 1507-1508.

<sup>121</sup> Moskowitz deposition Vol. 6 at 1505, 1507-1508.

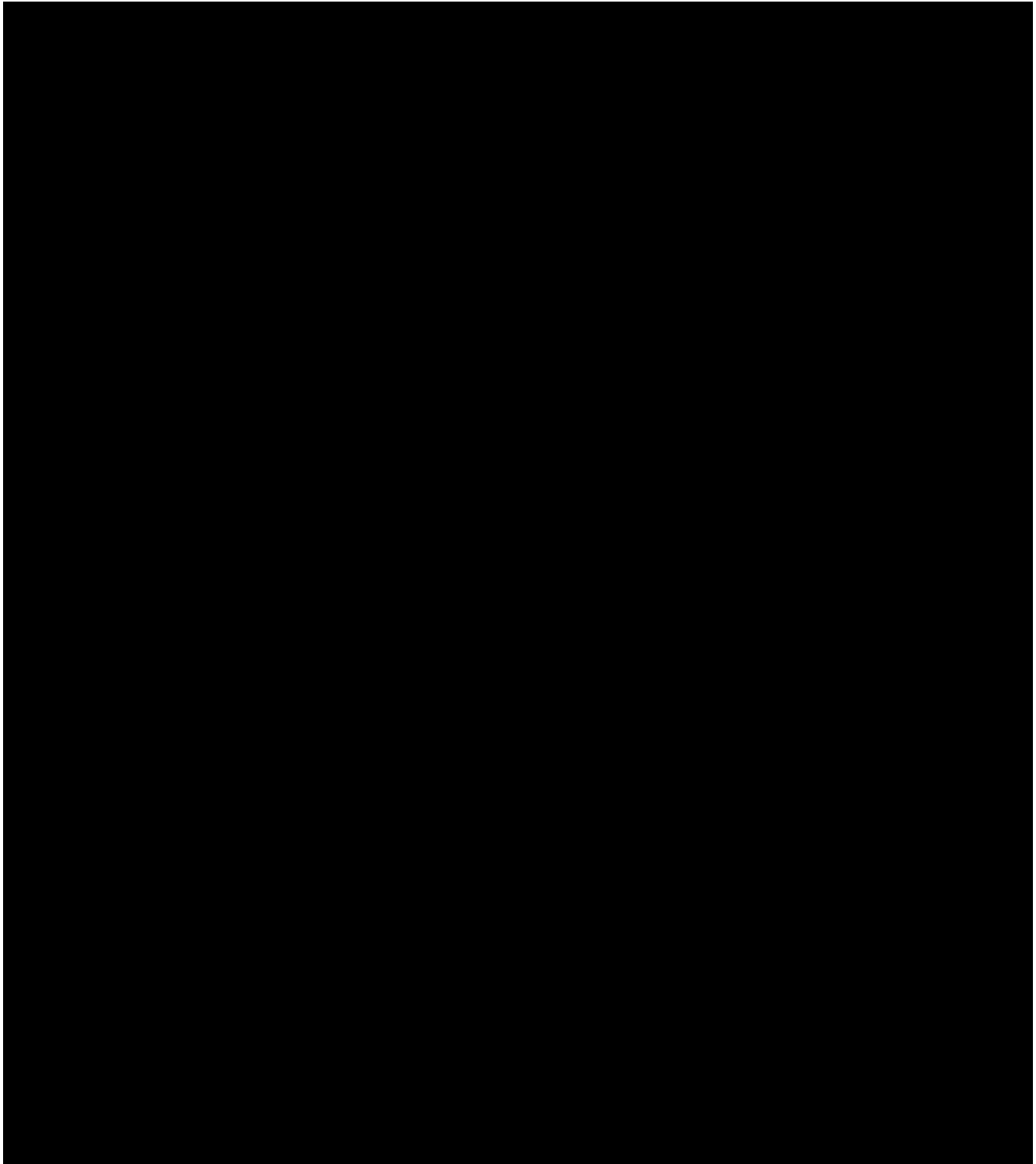


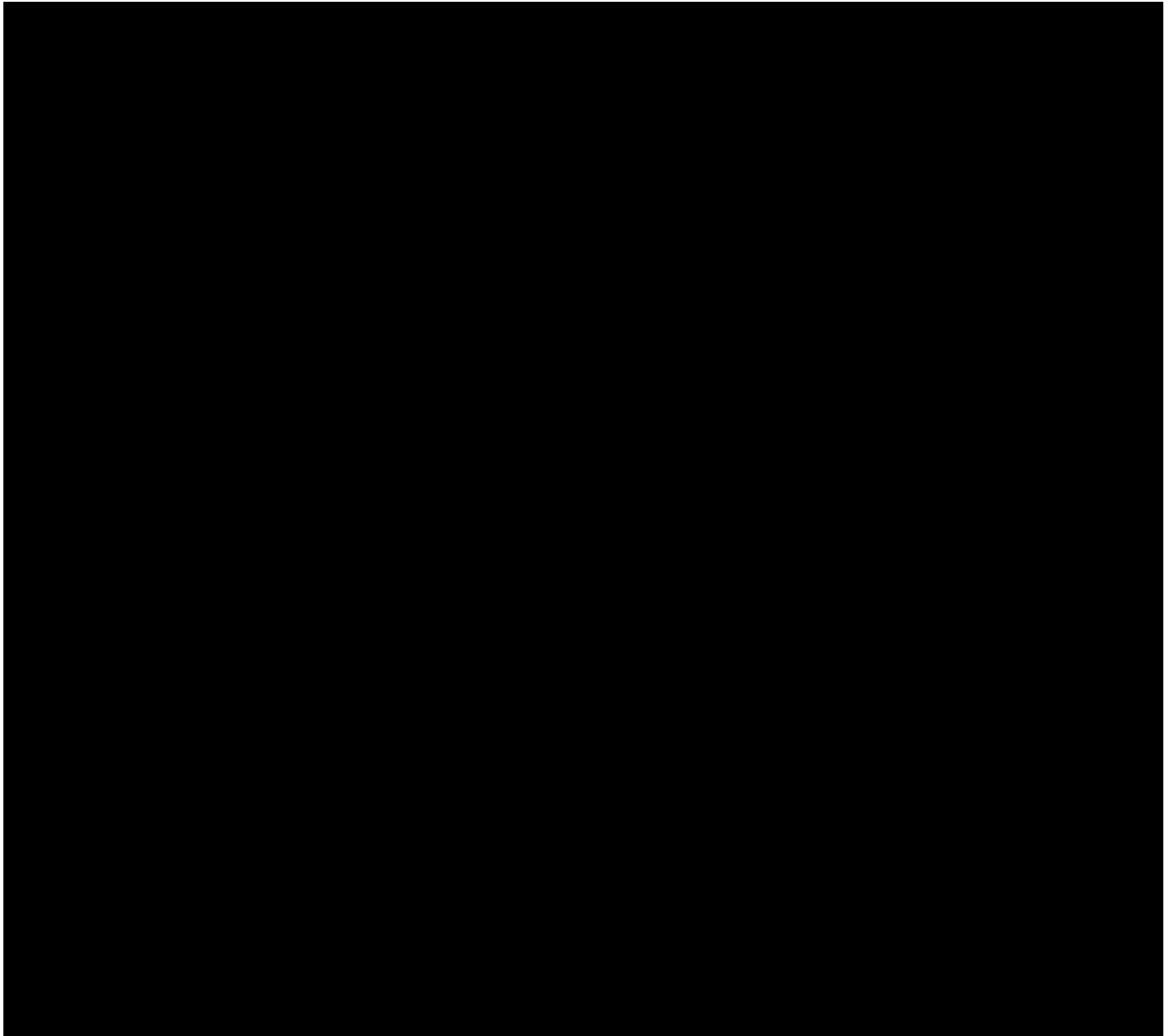
<sup>123</sup> Complaint at 2.

<sup>124</sup> Google Inventor Search: Scott A. Moskowitz,  
<https://www.google.com/search?tbo=p&tbm=pts&hl=en&q=ininventor:#q=ininventor:%22scott+a.+moskowitz%22&hl=en&tbs=ptso:us,sbdo:l&tbm=pts>.

<sup>125</sup> Google Inventor Search: Scott A. Moskowitz,  
<https://www.google.com/search?tbo=p&tbm=pts&hl=en&q=ininventor:#q=ininventor:%22scott+a.+moskowitz%22&hl=en&tbs=ptso:us,sbdo:l&tbm=pts>.

64. Based on that information, I would expect only a small percentage of the maintenance fees and potentially none of the prosecution fees were incurred during the damages period related to the Abstract Patents. And, given the descriptions of other expenses in the Blue Spike P&L not already discussed, they would not customarily be considered incremental to Blue Spike's exploitation of the Abstract Patents.





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<sup>130</sup> See, e.g., Alabama Law Review, Volume 64, “The Rise of Contingent Fee Representation in Patent Litigation,” Schwartz, David L., 2012, p. 360.

**Damages Conclusion**

71. Therefore, adding together the incremental profits from the [REDACTED] based on the production to date, that are due to Audible Magic, are [REDACTED] StoneTurn Exhibit 1.

72. In addition, as previously discussed, for at least the nine parties dismissed with prejudice with no agreements,<sup>131</sup> I would expect there to be royalty payments. Based on the average value of the settlement royalties paid or pending [REDACTED]

**Other**

73. If the Court plans to submit pre-judgment interest to the jury or should otherwise request my assistance in computing pre-judgment interest, I am prepared to do so.

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<sup>131</sup> StoneTurn Workpaper 3.2.

EXHIBIT A



STONETURN  
GROUP

CPA-CFF-CPVA-CGMA/MPA-JD

Partner - Houston, Texas

StoneTurn Group LLP

Damages, Valuation, Fraud & Forensic Accounting

[aratliff@stoneturn.com](mailto:aratliff@stoneturn.com)

Alan serves as a consultant on business and IP valuations, IP licensing, fraud and forensic accounting investigations, and as an expert witness in litigation. Alan has also served as an arbitrator, mediator and Special Master. Alan has been qualified as an expert in federal (district and bankruptcy) and state courts on a wide-range of issues including but not limited to accounting, auditing and royalty auditing, business and IP valuation, economic damages, economics, customary financial and business practices, licensing, and transaction due diligence. Alan has more than 25 years of combined experience in law, accounting and consulting. Alan was recently recognized on the short list of Best Damages Experts in IAM's **Patent1000**.

*Professional experience*

Alan's recent engagements include matters in the automotive, biotech, chemical, computer, construction, consumer products and services, electrical products, energy, gaming, food & beverage, healthcare, insurance and other financial services, Internet e-commerce, medical device, mobile device, pharmaceutical, retail, semiconductor, software, telecom, and consumer product industries, among others. In those matters, among others, he served as an accounting expert in purchase price, toxic tort and joint venture disputes, conducted fraud and accounting investigations, served as an economic damages or valuation expert in medical malpractice, patent infringement, trade secret, copyright, trademark, franchise, contract and business tort disputes, and he served as a business custom and practice expert.

*Disclosure of Testimony*

- *IDT/eBay* (WD Ark 2010). Testifying damages expert at deposition for defendant and counter-plaintiff calling card service provider in VoIP patent disputes. Case settled.
- *Tyco/Covidien/Mallinckrodt/EZEM/ AC/ST/Bracco* (ED Tex 2010). Testifying damages expert at deposition/trial for plaintiff medical device maker in connection with patent dispute against competitor. Case settled between lost profits and royalty amount on last day of trial.
- *BP/Wellogix* (SD Tex Arbitration 2010). Testifying damages expert at deposition/arbitration for defendant energy-company in misappropriation of trade secrets dispute. Court-arbitrator (Hon. Ellison) found breach of contract for wrongful disclosure but only awarded \$1 nominal damages.
- *Tesco/Weatherford et al.* (SD Tex 2010). Testifying damages expert at deposition for plaintiff oilfield services-company in patent suit against competitors. Parties stipulated to my royalty rate.
- *Saffran/J&J, Cordis* (ED Tex 2010, 2011). Testifying damages expert at deposition/trial for plaintiff physician-inventor in vascular stent patent dispute. Jury awarded my client \$482 million and court awarded \$111 million in interest. Claim construction reversed and rendered on appeal.
- *Cameron/Duhn* (ED Cal 2008, 2009, 2011). Testifying damages expert at deposition/trial for defendant energy services-company in drilling patent dispute. Jury determined claims were invalid.
- *IBM/Acqis* (ED Tex 2010, 2011). Testifying damages expert at deposition/trial for defendant IBM in connection with blade server patent dispute. Plaintiff sought \$27.3 million but jury awarded \$9.1 million consistent with my alternative damages opinion.
- *Accenture/Wellogix* (SD Tex 2011). Testifying damages expert at deposition for defendant Accenture in connection with alleged misappropriation of software trade secrets dispute.
- *Key/Forbes* (ED Tex 2011). Testifying damages expert at deposition/trial for plaintiff Key in connection with well service monitoring technology patent infringement claims. Case settled for \$5.5 million after I testified which was within my royalty and lost profits damages range.
- *Croft/BELO* (Texas State Court 2011). Testifying damages expert at deposition for plaintiff proprietary school owner in business disparagement dispute. Case settled for our valuation.
- *ColorQuick/VistaPrint* (ED Tex 2011). Testifying damages expert at trial for online printing plaintiff in patent infringement dispute. Jury found no infringement.
- *X6D/Li-Tek, GDC* (CD Cal 2011). Testifying damages expert at deposition for 3D cinema technology plaintiff and counter-defendant in trade secret, patent-, copyright- and trademark-infringement disputes. Case resolved on liability through motion practice.

- *Internet Brands/Versata, Trilogy* (ED Tex 2012). Testifying damages expert at deposition/trial for defendant and counter-claimant automobile ecommerce software provider in connection with patent, contract and business tort claims and trade secret, contract and business tort counterclaims. Jury rejected plaintiff's \$14 million lost profits claims, invalidated plaintiff's patent, and awarded my client the \$2 million to which I testified plus \$1 nominal contact damages. Case affirmed on appeal.
- *Halliburton(Wellbore)/Schlumberger(M-I)* (SD Tex 2012). Testifying damages expert at deposition for clean well tech service provider in trade secret, contract and business tort dispute. Case settled.
- *DuPont/Monsanto* (ED Mo 2012). Testifying damages expert at deposition/trial for defendant in genetic soybean patent dispute with competitor. Case settled on appeal after plaintiff's verdict.
- *Corelogic/Interthinx* (ED Tex 2012). Testifying damages expert in deposition/trial for plaintiff loan software company in patent infringement suit against competitor. Jury found no infringement.
- *Syntrix/Illumina* (WD Wash 2012, 2013). Testifying damages expert in deposition/trial for plaintiff genetic testing research company in patent dispute against genetic testing product company. Jury awarded \$95,795,507, the amount to which I opined and final judgment of \$120 million.
- *Imperium/Apple,LG,RIM* (ED Tex 2013). Testifying damages expert at deposition for plaintiff A/V semiconductor designer in patent suit against retail camera phone providers. Cases settled.
- *Schlumberger/ERF* (Texas Arbitration 2013). Testifying damages expert at deposition/arbitration for defendant oilfield services company in breach of exclusive distribution agreement relating to wireless broadband equipment and services. Decision for my client.
- *Schlumberger/Crescent* (Texas State Court 2013). Testifying damages expert at deposition for plaintiff oilfield services company in trade secret misappropriation, breach of contract and business tort dispute with competitor and former employees. Case settled for total consideration equal to my damages computation.
- *Vicor/SynQor* (ED Tex 2014). Testifying expert in deposition for defendant power system component manufacturer in patent suit by power supply manufacturer. Case pending.
- *Intersil/TAOS* (ED Tex 2014). Testifying expert in deposition for defendant semiconductor manufacturer in patent, contract, trade secret and business tort suit by sensor manufacturer. Case pending.

#### Subject Matter & Industry Experience

Accounting	Copyright	IAM	Royalty Auditing
Antitrust	Derivatives	Investments	Securities
Bankruptcy	Due Diligence	Labor	Tax
Business Interruption	Environmental	Licensing	Theft
Business Valuation	Fiduciary	Lost Profits	Toxic Tort
Class Action	Forensic Acctg.	M&A Disputes	Trade Secret
Consumer	Franchise	Patent	Trademark
Contract	Fraud	Regulatory	Valuation
Automotive & Transport	Gaming	Professional Services	Semiconductor
Chemical	Healthcare	Publishing	Software
Computer	Insurance	Real Estate	Systems Consulting
Construction	Medical Devices	Recreation Equipment	Technology
Energy and Utility	Military Contractor	Retail & Consumer	Telecom
Financial Services	Pharma & Biotech	Securities	Web

#### Education, Employment, Teaching, Training & Licensure

- J.D. *cum laude*, Southern Methodist University, Full Tuition & Fee Scholarship, Law Review (Symposium Managing Editor), Order of the Coif, Who's Who
- Master's and BBA in Tax/Accounting, *magna cum laude*, Baylor University, full tuition and fee scholarship, teaching fellowship, Who's Who, Alpha Chi, ODK (top 1% campus leaders), Beta Gamma Sigma, Who's Who  
[Cumulative Hours: Accounting 54; Eco/Stat 30; Tax 30; Various commercial studies: 150]
- Law Clerk for the Hon. J. Smith Henley, US Court of Appeal (8<sup>th</sup> Circuit); Attorney at Weil Gotshal & Manges; National IP Practice Leader at Ernst & Young Litigation Advisory Services; Managing Director at InteCap and Huron Consulting; Partner, StoneTurn Group (2005 to date)
- Adjunct Professor/Lecturer – South Texas College of Law, Southern Methodist University, University of Houston Law Center; full-time lecturer, Baylor University, guest lecturer - University of Houston,

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Houston Baptist University, Virginia Tech, Boston University, University of Texas; Instructor, *Conviser CPA Review*

- Licensed attorney and AV-rated by Martindale-Hubbell. Member of the bars of Texas, Arkansas, the US Supreme Court, Fifth and Eighth Circuits, and various district courts. Fellow, American Bar Foundation, Pro Bono College and State Bar College
- Licensed CPA in Texas, 1986-date, Certified in Financial Forensics by the AICPA (1 of the first 250 CPAs accredited nationally), Certified in Patent Valuation (2011), and Chartered Global Management Accountant (AICPA)

*Publications and Speeches*

- Presenter at about 100 client seminar presentations
- Co-Panelist, "Patent Damages Roundtable", University of Texas Advanced Patent Law Institute (Austin 2014)
- Co-Panelist, "Damages Update," Fordham IP Summit (New York 2013)
- Session Coordinator, Trade Secret Track, AIPLA Annual meeting (D.C. 2013)
- Co-Panelist, "Damages Update", AIPLA Annual Meeting, Patent Litigation Committee (D.C. 2013)
- Co-Panelist, "Damages," Advanced Patent Litigation Course (Albuquerque SBOT 2013) (PEER REVIEWED PAPER)
- Co-Panelist, "Damages," 28th Annual Institute on Intellectual Property (University of Houston 10/12) (PEER REVIEWED PAPER).
- Moderator and Co-Panelist, "Tips and Tactics for Drafting and Using Settlement Licenses in Litigation Post-ResQNet," 40<sup>th</sup> Annual Meeting of the Intellectual Property Owner's Association (San Antonio 2012) (PEER REVIEWED PAPER).
- Co-Panelist, "Presenting Your Damages Case: New Challenges," 25<sup>th</sup> Annual Advanced Intellectual Property Law Course (State Bar of Texas/Houston 2012) (PEER REVIEWED PAPER).
- Panelist, IP Management Litigation Panel, Annual Meeting of AIPLA (D.C. 2011).
- Panelist, Patent Damages Panel, Annual Meeting of IPO (L.A. 2011).
- Presenter, "The FTC's Report on the Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition," IPO Damages & Injunctions Committee (May 2011).
- Co-chair/-presenter, "Complete Advocacy Series: Experts," South Texas College of Law (pending 2011).
- Presenter, "Preparing to Testify," SEAK 20<sup>th</sup> Annual Expert Witness Conference (Naples April 2011).
- Co-author, "Still Room for Improvement: Assisting the Trier-of-Fact in the Second Decade of Daubert," HLR 5 (2010) (PEER REVIEWED).
- Co-Facilitator, "Entire Market Value Rule," ABA IP Roundtable (Houston Nov. 2010).
- Presenter, "Trade Secret Damages", Anti-Trust & Business Litigation (SBOT 2010 webinar).
- Presenter, "Patent Damages Update," NASBA (New Orleans December 2009).
- Co-presenter, "Bankruptcy Law as It Applies to Patent Disputes," ALI-ABA Seminar (D.C. August 2009).
- Co-presenter, "Forensic Accounting Update," TSCPA CPE Expo (Houston May 2009).
- Author & Presenter, "Persuasive Direct, Withstanding Cross," UH Law Foundation Trial Institute (Dallas, Houston March 2009).
- Presenter, "Experts & Discovery," Houston Bar Association Expert Institute (September 2008).
- Co-presenter, "Forensic Accounting: What's Truth or Fiction," Houston Accounting Expo (May 2008).
- Co-presenter and author, "Expert Witness Preparation and Examination," Litigation and Trial Tactics, University of Houston Law Center (Houston and Dallas May 2008).
- Co-present and co-author, "Forensic Accounting & Damages: What's New?", Valuation Engagements: Fast & Furious, TSCPA/HC (Houston April 2008).
- Co-presenter and co-author, "Kicking the Tires a Decade After Kumho: Recent Cases and Caveats," Houston Bar Association, Seminar (Houston February 2008).
- Co-presenter, "Still Room for Improvement: Assisting the Trier-of-Fact in the 2nd Decade of Daubert," South Texas College of Law, 16th Annual Advanced Civil Trial Law Conference (Houston February 2007).
- Presenter, "Patent Damages Update," AIPLA Annual Meeting (D.C., October 2007).
- Co-Presenter, "Forensic Accounting," TSCPA CPE Expo (Houston May 2007).
- Author, "By the numbers: IP Litigation Update," State Bar of Texas IP Newsletter (Summer 2007) at 9.
- Presenter & Co-Author, "Expert Witness Preparation & Examination – For Deposition and Trial," University of Houston Law Foundation (Dallas May 2007).

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- Author, "Setting Litigation Priorities After *eBay v. MercExchange*," The Texas Lawyer (April 22, 2007) at 23 (PEER REVIEWED).
  - Presenter, "IP Valuation & Damages in the United States," People to People Delegation Program, Supreme Court of India and St. Wilfred's College of Law (Dehli and Jaipur, India April 2007).
  - Panelist, "Damages Hot Topics," Recent Developments, Strategies & Tactics in IP Damages Law, IPO (D.C. March 2007)
  - Presenter, "Damages Update," Texas Society of CPAs (Houston Chapter Litigation & Valuation Committee Meeting February 2007)
  - Presenter, "Defending Your Expert," ASA Houston Chapter Meeting (Houston January 2007)
  - Co-Author, Chapter 7, "Opinions & Expert Testimony," Handbook of Texas Evidence: Civil Practice (Aspen Legal Publishing 2006) (PEER REVIEWED).
  - Co-Author, "Care & Feeding of Experts," South Texas Law Review (Summer 2006) (PEER REVIEWED).
  - Presenter, "Kicking The Tires After *Kumho*: *Daubert*-proofing Your Financial Expert," Accounting Expo, Texas Society of CPAs (Houston May 2006).
  - Author & Presenter, "IP Damages Update," Licensing Executives Society (Washington, D.C. 2006).
  - Co-Author, "Preparation & Admission of Experts," The Advocate, State Bar of Texas Section of Litigation (Winter 2005) (PEER REVIEWED).
  - Co-Author & Co-Presenter, "The Care & Feeding of Experts," University of Houston Law Foundation, Expert Institute (Dallas & Houston November 2005).
  - Co-Author, "Accountants, Lawyers, Investment Bankers, and Other Non-Scientific Experts: Applying *Daubert* to Non-Science Expert Opinions," Fifth Circuit Reporter (September 2005) (PEER REVIEWED).
  - Co-Author & Co-Presenter, "Panel: Applying *Daubert* to Non-Science Expert Opinions," Annual Meeting of the National Association of Women Judges (Houston 2005).
  - Author & Presenter, "IA&T Damage Trends & Update," 20<sup>th</sup> Annual Institute for IA & T Law (Dallas September 2005).
  - Author & Presenter, "The Care & Feeding of Experts," University of Houston Expert Institute (Houston & Dallas 2005).
  - Author & Presenter, "Accountants, Lawyers, Investment Bankers & Other Non-Scientific Experts," Annual Meeting, National Association of Women Judges (Houston 2005).
  - Author & Presenter, "Update on Intellectual Asset & Technology Law Damages," 20<sup>th</sup> Annual IA&T Law Conference (Dallas 2005).
  - Presenter, "What All Lawyers Should Know About IP Damages," Houston Bar Association (July 2005).
  - Author & Presenter, "Care & Feeding of Experts," University of Houston Law Foundation, Advanced Civil Litigation, Houston & Dallas (May 2005) (PEER REVIEWED)
  - Presenter, "Forensic Accounting," TSCPA Accounting Expo 2005, Reliant Center, Houston (April 2005)
  - Planning Committee, Presenter & Panelist, "Expert Witness Update," Advance Civil Trial Institute, South Texas College of Law (February 2005).
  - Presenter, "Financial Expert Update," Texas Society of CPAs, Houston (January 2005).
  - Institute Co-Chair & Presenter, "Accounting & Valuation Experts," The Law of Accounting and Valuation," Univ. of Houston Law Center, Houston (November 2004).
  - Presenter, "Using Experts in IP Litigation," City Bar of New York (September 2004).
  - Co-presenter, "Valuing Business Method Patents," Financial Services IP Conference, New York (July 2004).
  - Co-presenter, "Expert Update," University of Houston Law Center, Dallas and Houston (June 2004).
  - Co-presenter, "Financial Damages Update," Houston Bar Association Litigation Section, Houston (May 2004).
  - Panelist, "IP as a Core Asset," Entrepreneurship in the New Economy, Boston (June 2004).
  - Co-presenter, "Kicking the Tires After *Kumho*: 2004 Expert Update," Federal Bar Association, Houston (May 2004).
  - Author, "Daubert in the States," American Bar Association Tort & Insurance Section (April 2004).
  - Presenter, "Profits, Damages and Statutory Damages in Trademark Infringement Cases," American Bar Association, Section of Litigation, IP Committee, Dallas, Houston, Tampa, New Orleans (March 2004).
  - Presenter, "IP Valuation: Real World Licenses v. The Reasonable Royalty in Litigation," Louisiana Bar Association and New Orleans Bar IP Sections (January 2004).
  - Co-presenter, "*Robinson* and Texas Expert Update," Houston Bar Association, Section of Litigation (January 2004).
  - Co-presenter, "Accounting Hot Topics for Computer & Information Lawyers," 18<sup>th</sup> Annual Computer & Information Law Conference, Dallas (October 2003).



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- Author, "Kumho Wrestling: Are Your IP Experts in Shape? - 2003 Update," ABA IPL Quarterly (October 2003) (PEER REVIEWED).
  - Author, "Biotech and Pharma R&D and Licensing Trends," 10 Journal of Biotechnology 1 (pending September 2003).
  - Co-Author, "The Independent Expert Evolution," 34 Texas Tech Law Review 4 (pending Summer 2003) (PEER REVIEWED).
  - Co-presenter, "Kicking The Tires After Kumho: 2003 Commercial Litigation Expert Update," Association of Women Attorneys, Houston (August 2003).
  - Presenter, "Global Licensing & Litigation Risk Update," Going Global Conference (Boston University, June 2003).
  - Presenter, "Expert Update," Advanced Expert Witness III, State Bar of Texas, Houston (December 2002).
  - Presenter, "IP Valuation & Damages in the United States," People to People Delegation Program, Cuban Society of Constitutional Law and Administration, University of Havana, and Bufete De Servicios Especializados Nacional Lawyers Organization (Havana Cuba November 2002).
  - Presenter, "IP Expert Update," US IP Owner's Association Annual Meeting, Los Angeles (November 2002).
  - Author, "Kicking The Tires After Kumho: The Bottom Line on Admitting Financial Expert Testimony 2002 Update," *Trial Lawyer* (Aspen Legal Publishing, 3 parts beginning October 2002) (PEER REVIEWED).
  - Author, "Daubert-proofing Your IP Experts: 2002 Update," *IP Litigator* (Aspen Legal Publishing, August 2002) (PEER REVIEWED).
  - Presenter, "Antitrust Implications of Patent Settlements," State Bar of Texas Annual Meeting, IP Section (June 2002).
  - Lecturer, "IP Damages," University of Houston, School of Business (March 2002).
  - Presenter, "Daubert-proofing Your Expert Reports: A View from the Chair," Advanced Litigation Institute, South Texas College of Law (February 2002).
  - Presenter, "IP Valuation: Real World Licensing Royalty Rates v. The Reasonable Royalty in Litigation," Fourth Annual IP Institute, Austin (February 2002).
  - Panelist, "Protecting Your IP and Preventing it from Walking Out the Door," *LegalTech*, London (November 2001).
  - Panelist, "Managing IP Litigation," *ACCA Annual Meeting* (October 2001).
  - Moderator, "International IP Update," 15<sup>th</sup> Annual Computer & Information Law Institute, Dallas (October 2001).
  - Moderator, "Expert's Shoot-out," *Ultimate Trial Advocacy Institute*, Houston (September 2001).
  - Co-author, "Kicking the Tires After Kumho: 2001 Update," 24 *Trial Lawyer* Vols. 4-5 (Aspen 2001) (PEER REVIEWED).
  - Moderator, "Intellectual Property Protection Strategies," *LegalTech*, San Francisco (August 2001).
  - Moderator, "IP Management Panel," *Annual Convention of the State Bar of Texas, IP Section*, Austin (June 2001).
  - Presenter, "Daubert Panel," *Advanced Economics & Valuation Institute*, CA Society of CPAs, Palm Springs (May 2001).
  - Author, "It's Not Just About Injunctions Anymore: An Overview of Money Damages in IP Litigation," 7 *IP Litigator* Nos. 3-4 at 1, 14 (Mar-Apr 2001) (Aspen).
  - Co-author, "Increasing Shareholder Value in the New Economy," American Corporate Counsel Association's *ACCA Docket*, Vol. 18 No. 10 at 60 (Nov/Dec 2000) (PEER REVIEWED).
  - Author, "Kumho Wrestling: Are Your IP Experts in Shape?" 23 *Trial Lawyer* 6 at 457 (Nov/Dec 2000) (Aspen).
  - Presenter, "IP Valuation & Damages in the United States," People to People Delegation Program, China University of Politics & Law Ministry of Justice, and Beijing University Law School (Beijing & Shanghai China November 2000).
  - Presenter, "Financial Expert Witness Update," *Annual Litigation Services Conference*, sponsored by State Bar of Texas Litigation Section and TSCPA Litigation Services Committee (Houston, November 2000).
  - Presenter, "Kicking The Tires After Kumho: Implications of Daubert for IP Experts," *Institute on Intellectual Property* (Galveston, October 2000).
  - Presenter, "Expert Witness Update," Federal Bar Association's *Federal Practice Workshop* (Houston, September 2000).
  - Co-author, "Kicking the Tires After Kumho: The Bottom Line on Admitting Financial Experts," 37 HOU. LAW REVIEW 431 (Summer 2000) (PEER REVIEWED).

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- Author, "Damages in Intellectual Property Litigation," *The American Lawyer's* CORPORATE COUNSEL MAGAZINE A18 (February 2000).
  - Presenter, "Kumho Wrestling: Are Your Financial Experts in Shape," *Business Torts Institute* (Houston, January 2000).
  - Presenter, "Expert Discovery: Discovery Rules & Expert Techniques," *Litigation Services Conference* (Houston, November 1999).
  - Co-author, "Kumho Wrestling: Are Your Experts in Shape?" TEXAS LAWYER 32 (October 25, 1999).
  - Presenter, "It's Not Just About Injunctions Anymore: Money Damages in IP Cases," *Intellectual Property Institute* (Houston, September 1999).
  - Presenter, "Y2K Update," *ABA Section of Litigation Annual Meeting*, Dallas (3/99).
  - Presenter, "No More or Know More? Imputation and Adverse Interests/Limitations in Professional Malpractice Cases," *Litigation Services Symposium*, Houston (10/95).
  - Author, "There's More to (and behind) the Recent Amendments to the Federal Rules of Civil Procedure," 41 FEDERAL BAR JOURNAL 433 (July 1994) (also reprinted by the Oregon Bar Association) (PEER REVIEWED).
  - Author, "Businesses Must Sometimes Decide: To Litigate or Not to Litigate", 12 BAYLOR BUSINESS REVIEW 9 (Spring 1994).
  - Presenter, "Ethical Issues for a CPA That May Arise In Connection with a Criminal Tax Investigation of a Client," *Client Representation in Criminal Tax Investigations*, Houston (2/94).
  - Co-Author, "Collateral Effects of a Bank Fraud Indictment or Conviction of Professional," *ABA Business Crimes*, Dallas (3/92).
  - Author, "Congress Deals Aviation Another Bad Hand," Southern Methodist University's *Law Review*, 55 J. AIR L. COMM. 1159 (Summer 1990).

#### *Professional Associations*

- **ABA** IP Section's technical advisor, special master and other expert's sub-committee (past chair 2004-05)
- **ABA** Section of Litigation IP Roundtable Chair for Houston (2000-), past Experts sub-committee co-chair (1999-2002), past co-chair pre-trial and discovery sub-committee (1996-98)
- Board, **Association of Corporate Counsel** (Houston Chapter, 2001-2004)
- Master, **American Inns of Court** (1997-)
- Member, **American Institute of CPAs** (Business Valuation & Litigation Services)
- **American Intellectual Property Law Association** Trade Secrets Damages & Valuation Committee Co-Chair 2013- (member Patent Litigation, IP Management, Annual Meeting Planning committees)
- Member, **Association of Certified Fraud Examiners**
- **Eastern District of Texas Bench Bar Conference** Planning Committee (2013-)
- Past President, Board and National Delegate, **Federal Bar Association** (South Texas Chapter)
- **Houston Bar Association**, CLE Committee (past co-chair of the Seminars, Institutes and On-Line sub-committees), Litigation Section Council (2003-2005), Lawyers in Public Schools Committee (past chair), Legal Lines Committee (past co-chair); Professionalism Committee (past member); Fee Disputes Committee (past member).
- Steering Committee, **Institute for IP & Information Law** (Dallas 2000-2005)
- Life Fellow, **ABA, Austin, Houston and Texas Bar Foundations**
- Fellow, **Texas State Bar College**
- Member, **Houston Intellectual Property Law Association** (past member Audit and Program committees)
- Member, **Intellectual Property Owner's Association** (Damage Theories Committee; Annual Meeting Committee)
- Member, **Licensing Executives Society**
- Member, **National Association of Certified Valuation Analysts**
- Member, **State Bar of Texas** (past Chair & Vice-Chair, Coordination With Other Professions Committee, 1996-98; committee member Litigation, IP sections, Trade Secret Committee involved in helping draft and pass Texas Uniform Trade Secret Act, 2013)
- Steering Committee, **South Texas College of Law** Advanced Civil Trial Institute (2003-2005) and **Computer & Information Law Institute** (2001-2006)
- Past Committee Chair, Litigation & Valuation Services Committee, **Texas Society of CPAs** (Houston Chapter 2007-2009)
- Co-Chair, Law of Accounting & Valuation Institute, **University of Houston Law Foundation** (2003-2005)

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*Civic & Community*

- City of Houston Proclamation for Public Service Recognizing “Alan Ratliff Day”, December 3, 2006
- 2014 Volunteer Houston “Greater Houston Services Award for Youth Services” Winner
- Board of Trustees, Theatre Under the Stars (2005-), Board Governance Committee (2014-), Community Outreach Committee (2005-), 2006 Gala Auction Co-Chair
- Board of Trustees, Chinquapin School (2002-), Finance Committee, Strategic Planning Committee
- Board of Directors, Brilliant Lecture Series (2013-)
- Board of Directors, Houston Heights Association (2012-13), Finance Committee
- Selection Committee, Southwest Conference Hall of Fame (Baylor Athletes/2012-)
- Campus Decision Making Committee, Hogg Middle School (2012-)
- Houston Baptist University Education Advisory Council (2011-) and Dean’s Development Council Chair
- Board of Directors, Girls Inc. of Greater Houston, Past President and Chairman of the Board; Chair, Project Eureka!, past Chair of Finance, Strategic Planning and Board Governance/Nominations Committees (2004-13)
- Board of Advisors, and Past VP, President Elect and Board Member, Texas Accountants & Lawyer’s for the Arts (1995-13)
- Board of Directors, Texas Society of CPAs (Houston Chapter) (2008-2009)
- Board of Directors and Treasurer, American Leadership Forum (Gulf Coast Chapter) (2010-2011)
- Chair, Mayor’s Jazz Brunch and International Jazz Festival Steering Committee Coordinating Chair (2002)
- Past Development Council and Athletic Director’s Council, Baylor University (1998-2006), Athletic Directors Circle (2006-), Houston Steering Committee, Baylor Alumni Association Network (2001-2003), National Chair, Baylor Young Graduate Foundation (1996-98); Houston Chapter President, Baylor Bear Foundation (1998-2000).
- Habitat For Humanity Partner & Houston 100 Coordinator (1998)
- Substitute Teacher in HISD, Spring Branch, Chinquapin School, Lutheran North: Lawyer’s in Public Schools, Volunteers in Public Schools, Junior Achievement and general volunteer (1985-)
- Fellow, Pro Bono College State Bar of Texas (2000-)
- Weil, Gotshal & Manges Outstanding Pro Bono Service Award (Houston 1996), Houston Office Partner’s Award (1995)
- ISC Sports Chaplain, 2002, 2004, 2006, 2008, 2010, 2012, 2014 Olympic Games

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Starting Bates #	Ending Bates #	Starting Bates #	Ending Bates #	Starting Bates #	Ending Bates #	Starting Bates #	Ending Bates #
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Starting Bates #	Ending Bates #	Starting Bates #	Ending Bates #	Starting Bates #	Ending Bates #	Starting Bates #	Ending Bates #
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Starting Bates #	Ending Bates #
BLU023855	BLU023874
BLU023938	BLU023947
BLU0445056	BLU0445056

Starting Bates #	Ending Bates #	Starting Bates #	Ending Bates #	Starting Bates #	Ending Bates #
AUDMAG02627794	AUDMAG02627796	AUDMAG02630564	AUDMAG02630564	AUDMAG02631117	AUDMAG02631117
AUDMAG02627797	AUDMAG02627846	AUDMAG02631117	AUDMAG02631117	AUDMAG02631214	AUDMAG02631215
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AUDMAG02630563	AUDMAG02630563				



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**Audible Magic Depositions and Exhibits**

Deposition of Erling Wold dated 10/27/14 Vols. 1 and 1A  
Deposition of Thomas Blum dated 10/28/14 Vols. 1 and 1A  
Deposition of Jim Wheaton dated 10/29/14  
Deposition of James Schrempp dated 10/29/14  
Deposition of Curtis Dowdy dated 10/30/14  
Deposition of Rob Williams dated 10/30/14  
Deposition of Vance Ikezoze dated 10/31/14 and Exhibits

**Blue Spike Depositions and Exhibits**

Deposition of Scott Moskowitz dated 12/9/14, Vol. 1, and Exhibits  
Deposition of Scott Moskowitz dated 12/10/14, Vol. 2, and Exhibits  
Deposition of Scott Moskowitz dated 12/11/14, Vol. 3, and Exhibits  
Deposition of Scott Moskowitz dated 1/14/15, Vol. 4, and Exhibits  
Deposition of Scott Moskowitz dated 1/15/15, Vol. 5, and Exhibits  
Deposition of Scott Moskowitz dated 1/16/15, Vol. 6, and Exhibits

**Legal Filings**

Original Complaint for Patent Infringement filed 8/9/12  
Plaintiff's Disclosure of Asserted Claims and Infringement Contentions with Accompanying Document Production filed 2/26/14  
Exhibit A to Plaintiff's Disclosure of Asserted Claims and Infringement Contentions with Accompanying Document Production filed 2/26/14  
Scheduling and Discovery Order (Customer Defendants) filed 3/6/14  
Scheduling and Discovery Order (Supplier/Independent Defendants) filed 3/6/14  
Joint Notice of Designation of Supplier/Independent and Customer Defendants filed 3/17/14  
First Amended Complaint for Patent Infringement Against Audible Magic Corporation, et al. filed 4/4/14  
Audible Magic Corporation's Answer to Blue Spike LLC's First Amended Complaint for Patent Infringement and Counterclaims Against Blue Spike LLC, Blue Spike, Inc and Scott A. Moskowitz filed 4/18/14  
Protective Order filed 5/14/14  
Plaintiff Blue Spike LLC's Responses to Defendant Audible Magic's First Set of Interrogatories filed 5/16/14  
Audible Magic Corp.'s Responses and Objections to Blue Spike's First Set of Interrogatories (Nos. 1 - 14) filed 6/5/14  
Audible Magic Corp.'s First Supplemental Responses and Objections to Blue Spike's First Set of Interrogatories (Nos. 1 - 14) filed 6/23/14  
Plaintiff Blue Spike LLC's Supplemental Responses to Defendant Audible Magic's First Set of Interrogatories filed 6/25/14  
Audible Magic Corp.'s Second Supplemental Responses and Objections to Blue Spike's First Set of Interrogatories (1 - 14) filed 7/21/14  
Counter Defendant Blue Spike Inc.'s Responses to Defendant Audible Magic's First Set of Interrogatories filed 7/23/14  
Counter Claim Defendant Moskowitz's Responses to Defendant Audible Magic's First Set of Interrogatories filed 7/23/14  
Plaintiff Blue Spike LLC's Responses to Defendant Audible Magic's Second Set of Interrogatories filed 8/1/14  
Audible Magic Corporation's and its Customers' Motion for Partial Summary Judgment Based on License and Exhibits filed 8/7/14  
Plaintiff Blue Spike LLC's Opposition to Audible Magic Corporation's and its Customers' Motion for Partial Summary Judgment Based on License and Exhibits filed 9/2/14  
Blue Spike LLC's Reply in Response to Defendant Audible Magic's First Amended Counterclaims - Dkt 1742 filed 9/5/14  
Blue Spike LLC's Reply in Response to Defendant Audible Magic's First Amended Counterclaims - Dkt 1744 filed 9/5/14

**Audible Magic Corporation v. Blue Spike, LLC, et al.  
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**Legal Filings (cont.)**

Scott Moskowitz's Reply in Response to Defendant Audible Magic's First Amended Counterclaims filed 9/5/14  
Audible Magic Corporation's and its Customers' Reply in Support of their Motion for Partial Summary Judgment Based on License filed 9/15/14  
Plaintiff Blue Spike LLC's Sur-Reply to Audible Magic Corporation's and its Customers' Motion for Partial Summary Judgment Based on License filed 9/25/14  
Report and Recommendation of the United States Magistrate filed 10/16/14  
Order Granting Plaintiff's Motion to Modify the Scheduling Order filed 10/16/14  
Memorandum and Opinion filed 10/16/14

**Produced Without Bates Label**

Confidential Settlement and License Agreement between Blue Spike LLC and Irdeto B.V.  
Settlement Agreement between Blue Spike LLC and Contributor Corporation  
Settlement Agreement between Blue Spike LLC and Entropic Communications, Inc.  
Settlement and License Agreement between Blue Spike LLC and Cognitive Systems GmbH  
Settlement and License Agreement between Blue Spike LLC and iHeartMedia Management Services, Inc.  
Settlement and License Agreement between Blue Spike LLC and IrTech, Inc.  
Settlement and License Agreement between Blue Spike LLC and Vobile, Inc.  
Technology\_Tutorial\_re\_Audible\_Magic's\_308\_patent  
Technology\_Tutorial\_re\_four\_Blue\_Spike\_patents

**Other**

Acacia Research Corporation Form 10-K dated 12/31/13  
Alabama Law Review, Volume 64, "The Rise of Contingent Fee Representation in Patent Litigation," Schwartz, David L., 2012  
Audible Magic Corporation: Private Company Information - Businessweek, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=936050>  
BusinessWire, "Audible Magic Launches Video Fingerprint ACR Technology," dated 6/24/13  
Google Inventor Search: Scott A. Moskowitz, <https://www.google.com/search?tbm=pts&hl=en&q=ininventor:#q=ininventor:%22scott+a.+moskowitz%22&hl=en&tbs=ptso:us,sbdo:1&fbm=pls>  
<https://twitter.com/audiblemagic>  
Network-1 Technologies, Inc. Form 10-K dated 12/31/12  
Network-1 Technologies, Inc. Form 10-K dated 12/31/13  
Practical Cryptography, "Mel Frequency Cepstral Coefficient (MFCC) Tutorial" <http://practicalcryptography.com/miscellaneous/machine-learning/guide-mel-frequency-cepstral-coefficients-mfccs/>  
Public Access to Court Electronic Records (PACER)  
RPX Corporation Form S-1 dated 9/2/11  
Tech News and Analysis, "Audible Magic Raises Nearly \$1.3 Million in Funding," <http://gigaom.com/2009/08/21/419-audible-magic-raises-nearly-1-3-million-in-funding/>  
U.S. Patent No. 5,918,223  
U.S. Patent No. 7,346,472  
U.S. Patent No. 7,660,700  
U.S. Patent No. 7,949,494  
U.S. Patent No. 8,214,175  
USPTO Assignments for U.S. Patent No. 7,346,472 and Continuations  
Washington Lawyers for the Arts, "Contingency Fee Lawyers in Intellectual Property," <http://thewla.org/contingency-fee-lawyers-in-intellectual-property/>

Additional last 20 pages redacted  
pursuant to the protective order.